Supreme Court, U.S.
SEP 20 1990
JR.

NO. 89-1734

Supreme Court of the
United States

Term: October 1990

Thomas V. Cassidy, Appellant-Petitioner,	]	
	]	Petition For
	]	Writ of
-vs-	]	Certiorari To
	]	The United
United States of America, Commissioner of Internal Revenue, Appellee-Respondent.	]	States Court of Appeals For the Seventh Circuit

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PETITIONER'S RULE 15.6 REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S RULE 15.6 REPLY TO

BRIEF IN OPPOSITION

ONE

POINT & QUESTION PRESENTED

I.

The same Respondent's, as in this present appeal, REPLY BRIEF FOR APPELLANT "Argument" in *Roberts v. United States of America, Commissioner of Internal Revenue Service*, (10th Cir. Case number 89-5145) now cited as 906 F.2d 1440 (10th Cir. June 27 1990) made by the same attorneys as in this action completely belies and contradicts Respondent's present position that "*the court of appeals correctly applied the doctrine of judicial estoppel*" and that no conflict exists between United States Circuit Courts of Appeal and other federal courts as to the judicial application of 11 U.S.C., sec. 523(a)(7)(A)(B).

TWO

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REPLY IN OPPOSITION

ARGUMENT

A.

Petitioner Cassidy here incorporates by reference his September 7, 1990 filed RULE 15.7 SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI.

The same Respondent's, as in this present appeal, REPLY BRIEF FOR APPELLANT "Argument" in *Roberts v. United States of America, Commissioner of Internal Revenue Service*, (10th Cir. Case number 89-5145) now cited as 906 F.2d 1440 (10th Cir. June 27 1990) made by the same attorneys as in this action completely belies and contradicts Respondent's present position that "*the court of appeals correctly applied the doctrine of judicial estoppel*" and that no conflict exists between United States Circuit Courts of Appeal and other federal courts

as to the judicial application of 11 U.S.C., sec. 523(a)(7)(A)(B).

The chief attorneys in this case for the Respondent are Shirley D. Peterson, Assistant Attorney General and Gary D. Gray, Attorney, Department of Justice. The chief attorneys in the Tulsa, Oklahoma and Denver, Colorado U.S. 10th Circuit court of appeals case of ***Roberts v. United States of America, Commissioner of Internal Revenue Service***, (10th Cir. Case number 89-5145) now cited as 906 F.2d 1440 (10th Cir. June 27 1990) for the Respondent were Shirley D. Peterson, Assistant Attorney General and Gary D. Gray, Attorney, Department of Justice.

The agents and officials of the U.S. 10th Circuit court of appeals have supplied Petitioner with a copy of REPLY BRIEF FOR APPELLANT in *Roberts*, supra.

Appellant's there and Respondent's here "Argument" at pages 2, 3 and 4 of its U.S. 10th Circuit court of appeals REPLY BRIEF chimes in totally with Petitioner Cassidy's assertions on this Certiorari, to wit:

> *"The debtors (Roberts) rely on the Eleventh Circuit's recent decision in Burns v. United States, 887 F. 1541 (1989), in arguing that the plain language of the statute {[sic] 11 U.S.C., sec. 523(a)(7)(A)(B)} indicates that Congress intended that even a penalty related to a nondischargeable tax liability will be dischargeable if the underlying liability is more than three-years old when the bankruptcy case is commenced. But the Eleventh Circuit is not the only court to have offered an*

interpretation of Section (a)(7), nor is its interpretation consistent with the interpretation of all other courts that have considered the provision. As we ([sic] U.S.A.,C.I.R.S.) explained in our opening brief (at 12), the Seventh Circuit concluded that 'subsection 523(a)(7)(A) mandates that [tax related] penalties are not dischargeable if the underlying tax with respect to which the penalty was imposed is also nondischargeable,' irrespective of the age of the underlying tax. Cassidy v. Commissioner, 814 F.2d 477, 481 (7th Cir. 1987){Cassidy I}. *[sic] 'However', the Seventh Circuit has recently stated that its analysis in this regard was dicta, since*

the issue was never properly before the court. ***Cassidy v. Commissioner****, 892 F.2d 637 (7th Cir. 1990)*{Cassidy II: This appeal}\End Note #1 *Be that as it may, we submit that the Court's analysis of Section 523 (a)(7) was correct. At all events, inasmuch as it* ***contradicts*** *the* ***Eleventh Circuit****'s interpretation of Section 523 (a)(7),* ***it undercuts the debtors' suggestion that the provision is 'clear'****.*

Other courts have also read the provision in a manner at odds with the court's reading in ***Burns****. . . .The fact that so many courts have discerned a* ***different meaning*** *from that urged by the debtors and adopted by the courts below,* ***belies the*** *debtors'* ***contention that the tortured and convoluted***

language of Section 523(a)(7) is plain and unambiguous." (Emphasis added)

The Constitution of the United States, Article I, Section 8 [4], mandates that Congress *"shall establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."*

11 U.S.C. sec. 523 (a)(7)(A)(B) by virtue of its U.S. circuit courts' interpretation of *In Re Burns*, 887 F.2d 1541 (11th Cir. Nov. 13, 1989) and *Roberts v. U.S.A., Comm. Int. Rev.*, 906 F.2d 1440 (10th Cir. June 27, 1990) on the one hand and *In Re Cassidy*, 892 F.2d 637 (7th Cir. 1990) on the other hand is not uniform; presents a conflict between United States courts of appeals [Rule 10.1(a)] and calls for an exercise of this Court's power of supervision.

B.

A doctrine of "judicial estoppel" as applied, prescripted and memorialized by the U.S. 7th Circuit court of appeals in ***In Re Cassidy***, 892 F.2d 637 (7th Cir. 1990) has no place in the federal judicial system. \End Note #1

Cassidy II is wrong on this point and if not reversed will spawn injustices which in turn will only assault the federal judicial economy by multifarious appeals with the ever attendant free-flowing injustices to litigants throughout the land.

The late United States Supreme Court Justice Potter Stewart wrote: ***"Fairness is what justice really is."***

The U.S. Seventh Circuit court of appeals in canonizing unfairly "judicial estoppel" as it did for the first time in its ninty-four year history has so far departed from the accepted and usual

course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

The Court is requested to direct the clerk to issue the writ of certiorari to the U.S. 7th Circuit court of appeals.

Respectfully submitted,

Thomas V. Cassidy,
Pro se, Petitioner
on Certiorari

End Note 1:

The U.S. 7th Circuit court of appeals in *Cassidy II*, In Re Cassidy, 892 F.2d 637 (7th Cir. 1990), [This appeal] holds that its holding in *Cassidy I*, Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987), was dicta but then adopts the holding in *Cassidy I* as its holding in *Cassidy II* by affecting a non stare decisis "judicial estoppel" doctrine for the first time in its ninty-four (94) year history, since ordained and established by Congress in 1896, *Cassidy II*, pages 641 and 642, and which "judicial estoppel" doctrine has not been adopted by any of the other twelve United States Judicial Circuits.

Then in its holding in *Cassidy II*, In Re Cassidy, 892 F.2d 637 (7th Cir. 1990), the U.S. 7th Circuit court of appeals concedes that Appellant Cassidy [here Petitioner] never has had a hearing on the merits of any kind or that no issues have been "actually litigated" in any of the courts below and that "*a party is not bound to a position it unsuccessfully maintained*" but notwithstanding Petitioner Cassidy is "judicially estopped" and out of court.

As Judge David H. Souter astutely observed recently as to when a case on appeal should be reversed, in his confirmation testimony before the U.S. Senate: "*Whether one of stare decisis or not, it must first be determined if the law of the case is wrong, and if 'yes' or the law of the case would be wrong for the citizens in its application then it must be nipped and reversed before the reliance on the 'bad law' becomes too great or even greater.*" Makes sense!